No. 97-1833

Supreme Court, U.S.
FILED
JUN 15 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

CAROLE BIALCZAK, RICHARD F. MELL, JOHN J. BUCHANAN, PATRICK M. HUELS, GINGER RUGAI, MARY ANN SMITH, THOMAS MURPHY, BRIAN DOHERTY, RAY SUAREZ, AMBROSIO MEDRANO, THEODORE MAZOLA, EDWARD M. BURKE, MARK FARY, LORRAINE DIXON, BERNARD L. STONE, JAMES J. LASKI, PATRICK J. O'CONNOR, PATRICK J. LEVAR, EUGENE C. SCHULTER, WILLIAM J.P. BANKS, MICHAEL WOJCIK, BURTON F. NATARUS, JOHN S. MADRZYK, THERIS M. GABINSKI, and BERNARD J. HANSEN,

v. *Petitioners,*

RICHARD BARNETT, ED H. SMITH, ALLAN STREETER, JOHN O. STEELE, DOROTHY TILLMAN, ROBERT SHAW, JESSE J. EVANS, BOBBY L. RUSH, PERCY GILES, WILLIAM M. BEAVERS, TONI PRECKWINKLE, RICKEY HENDON, ARENDA TROUTMAN, SHIRLEY A. COLEMAN, VIRGIL E. JONES, JESSE MILLER, SAM BURRELL, and EDDIE REED,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's decision in this case. The opinion of the court of appeals (Pet. App. A) is as yet unreported.

STATEMENT OF THE CASE

In 1992, the City of Chicago adopted a new redistricting plan for the 50 wards from which aldermen are elected to the Chicago city council. 24a-25a. According to the 1990 census, the City of Chicago's total population was 38.6% African-American, 37.9% white, and 19.6% Latino. 28a. Also, according to the 1990 census, Chicago remains a highly-segregated city, with approximately 90% of the city's African-American population living in census blocks that are over 50% African-American, while over 83% of the city's white population lives in census blocks that are over 50% white. 27a-29a. The city's plan, however, provided the white community with 24 wards (48%), the African-American community with 19 wards (38%), and the Latino community with seven wards (14%). 9a.[1]

The African-American *Barnett* plaintiffs challenged this plan under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, alleging that the plan has the effect of denying

[1] In 1995, the first aldermanic election held under the challenged map resulted in the election of 24 whites, 19 African-Americans, and seven Latinos to the city council. 96a.

African-Americans an opportunity equal to that of whites to elect aldermanic candidates of their choice.[2] At trial, plaintiffs showed that voting in Chicago aldermanic elections is marked by extreme racial polarization. Particularly telling were the following undisputed facts.

First, in the 1992 referendum by which the current ward map was adopted, approximately 87% of the white voters supported the map drawn by defendants while approximately 89% of African-Americans voted for an alternative map that provided for additional African-American wards. 95a, 93a. Second, plaintiffs proved at trial that "African-American voters consistently prefer to vote for African-American candidates." 200a. Third, the African-American voters' decided preference for African-American candidates "is never shared by non-African-American voters" in any of the elections that were analyzed. Pls.' Exh. 13 at 16. Indeed, in Chicago, white crossover voting for African-American candidates is, as acknowledged by both plaintiffs' and defendants' experts, virtually nonexistent. Pls.' Exh. 13 at 16-17; Tr. 4102-03; 196a.[3] As a result, except in wards with an effective African-American majority, African-Americans

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[2] The *Barnett* plaintiffs, who brought claims under both § 2 and the 14th and 15th Amendments to the United States Constitution, appealed only the judgment concerning their § 2 claim. The *Barnett* case was consolidated with a case brought by the *Bonilla* Latino plaintiffs. The city prevailed in that case.

[3] For example, in the 23 biracial aldermanic elections since 1983, only four African-American candidates have received more than an estimated 3.2% of the white vote, and none have received more than an estimated 10.5%. Pls.' Exh. 13 at 9-17, 56-57; Exh. 14a at 2-3, 7; Exh. 150 at 1-3, 16-17.

have no meaningful opportunity to elect their candidates of choice, particularly when – as is generally the case on this record – those candidates are African-American. 6a; Pls.' Exh. 13 at 4-8, 9-17; Exh. 14a at 1-4; and Exh. 150 at 1-3.

Plaintiffs also showed that it is possible to draw additional wards – more than the current 19 – with an effective African-American majority. Indeed, plaintiffs introduced illustrative maps which showed that (using minimum population deviations and a more rigorous compactness standard than was used by defendants) it was possible to draw as many as 25 wards with effective African-American majorities. *See, e.g.*, Pls.' Exh. 55. No map was introduced by any party to show that any more than the current 24 effective white-majority wards could possibly have been drawn.

In addition, plaintiffs showed that the ward boundaries were manipulated to disproportionately fracture and pack African-American population. 182a-83a, 190a. The trial court found that plaintiffs' expert had "successfully identified areas of fractured African-American population," 182a, and that defendants' expert's own analysis supported the conclusion that African-Americans "were disproportionately fractured more than whites." 190a. The trial court also recognized that the African-American population in Chicago is more packed than the white population in that:

> African-American majority wards have, on average, a nearly 20% higher concentration of African-American population than the [concentration of white population in] white majority wards (87% as opposed to 68%).

183a. Furthermore, as the district court found, plaintiffs' illustrative maps showed that these disparities were unnecessary and could be significantly reduced. 180a-183a.[4]

Also, in the three areas of the city where demographic patterns permitted the drawing of either effective white or effective African-American wards, defendants uniformly drew effective white wards.[5] *Cf.* Stip. Exh. 1 (the current map), *with* Pls.' Exh. 40; Exh. 42; Exh. 65a. These boundary manipulations go a long way in explaining how defendants were able to draw a ward map that provided Chicago's white community with 24 effective wards, and its larger African-American community with only 19. 9a.

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[4] In the end, however, the trial court discounted all of this evidence in the belief that the illustrative maps offered by plaintiffs to show that the disparities in fracturing and packing African-American and white population could be easily remedied, did not meet the court's standards. 183a, 221a-22a, 224a, 231a. In fact, however, the court held plaintiffs' illustrative maps to a much higher standard than defendants used in drawing the city's map. None of plaintiffs' illustrative maps include ward boundaries that resemble the bizarre, "unwieldy" shape of the 12th ward in the city's map. *See* Stip. Exh. 1; 135a-36a.

[5] In their petition, defendants assert that, in an effort to preserve the existing number of African-American wards, "thousands of whites were placed in African-American dominated wards (which had lost population)." Pet. 7. The flaw in their argument, however, is that, as the trial court found, they offered no maps to show that this white population could have been used to create an additional white ward. 189a.

On this evidence, the district court found that the plaintiffs had satisfied the three *Gingles* prerequisites to § 2 liability. 131a; 173a-177a; 199a-200a. The district court nevertheless entered judgment for the defendants because of its conclusion that, in the end, the map provides African-Americans with "electoral control of a proportional share of the wards" while whites are not overrepresented. 220a. Of preeminent importance in that determination was the district court's finding that the challenged map distributes wards along a 19, 19, 7, and 5 split, giving both African-Americans and whites effective majorities in a number of wards – 19 – proportionate to each group's share (38%) of the total population (and giving Latinos effective majorities in seven wards). This finding, in turn, depends on the district court's belief that five wards are not properly characterized as African-American, white, or Latino, but are "multi-racial" wards in which no group can elect its candidate of choice without the support of other groups, and in which the aldermen – admittedly always white – are therefore responsive to the concerns of African-Americans, whites, and Latinos alike. 85a, 184a.

On appeal, the Seventh Circuit concluded that "the reasoning by which the district judge approved the City's map, which created only 19 black-majority wards, was deeply flawed." 14a. Contributing to this conclusion was the appellate court's determination that the district court "clearly erred in taking these five wards out of the white column." 8a.

The Seventh Circuit reached this conclusion in a decision that recounted the analytic framework for § 2 challenges to single-member district plans and applied that

framework to the particular facts of this case. As the court explained, citing *Thornburg v. Gingles*, 478 U.S. 30 (1986), where voting is racially polarized and it is possible to draw an additional majority-minority ward, 5a, – *i.e.*, if the *Gingles* preconditions are met – "then a more searching inquiry into whether the challenged map denies a minority group a fair opportunity to elect the candidates that its members prefer becomes necessary." 5a. In making this inquiry, "[a]n important consideration" in deciding whether the map violates § 2 is proportionality – "whether the plan creates majority districts for each group in proportion to each group's electoral potential." 7a. But while proportionality is an important consideration, it "is not the be-all or the end-all of redistricting under the Voting Rights Act," since "[d]eviations from proportionality, especially small ones, can be justified by reference to other factors, such as compactness of districts" or other legitimate redistricting considerations. 14a; *see also* 7a, 15a. Because these considerations are entitled to appropriate weight, plaintiffs must be able to show that "there *is* a feasible alternative to the defendant's map," 4a, one that provides equality of electoral opportunity without "trampling on any values that deserve weight in redistricting," 14a.

The Seventh Circuit then applied this framework to the facts of this case. The court concluded that voting for aldermen in Chicago is racially polarized, 6a – indeed, "rigid[ly]" so, 9a, to such an extent that, outside of wards drawn to give them an effective majority, African-Americans "will not be able to elect aldermen of their choice." 6a. The court likewise concluded that plaintiffs had

shown they could draw an additional African-American-majority ward. 14a.

The court next found disproportionality, with African-Americans underrepresented and whites overrepresented in terms of the number of wards in which their group constitutes the majority. 9a, 13a. To reach this conclusion, the court had to determine both the relevant population base for its proportionality analysis and the correct characterization of wards as African-American, white, Latino, or influence wards. The court ruled that citizen voting-age population ("CVAP") is the correct population base for assessing proportionality. 10a. To count the number of African-American wards, the court followed the "rule of thumb" established by prior case law (and relied upon by the architect of the city's map, 85a-86a) under which a ward is viewed as having an effective African-American majority when the African-American percentage of the total population is 65%. 7a. Using this benchmark, the court agreed with the district court that the challenged map contains 19 African-American-majority wards. 7a-8a.

To count the number of white wards required an examination of the five wards labeled "multi-racial" by the district court. Contrary to the repeated assertion of the petitioners, Pet. 14-15, 17, the status of these five wards as wards in which African-Americans exercise meaningful influence was *not* undisputed on this appeal. Plaintiffs' briefs reviewed extensively the evidence showing that whites controlled each of the wards and that there was no evidence of meaningful African-American influence. In four of the five wards, whites have an

absolute majority of the voting-age population,[6] while the African-American voting-age population ranges in these wards from as little as 11.6% to a high of only 23.6%. Stip. Exh. 1. In each of these wards, given their rates of turnout and portion of the voting-age population, whites constitute the overwhelming majority of voters on election day. Defs.' Exh. 515 at 28, 30, 35, 38, 40-42, 44. In addition, racial appeals have been used in the last three aldermanic elections in one of these wards (ward 46). 210a; Tr. 7193-95.

In the fifth ward – Ward 18 – the African-American share of the total population – 55% – falls far short of the 65% conventionally viewed as necessary for an effective African-American majority, 7a, and whites – with 44% of the voting-age population, in practice (given the extreme turnout disparity between whites and African-Americans, 193a), consistently are a majority of actual voters in aldermanic elections. 8a. In the last three 18th ward aldermanic elections, the white crossover vote for African-American candidates has ranged between 0.0% and 4.5%. 177a. In the 18th ward's last aldermanic election, the white candidate raised ten times the money raised by all of the African-American candidates combined. 164a-65a.

Finally, where voting patterns could be analyzed within these five wards, they were routinely polarized

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[6] The white majority of the potential electorate (ranging from 50.3% to 54.2% of the voting-age population) is even more pronounced in these four wards because Latinos, only 56% of whom, citywide, are citizens, make up between 12.9% and 37.5% of the voting-age population of these wards. 214a; Stip. Exh. 1.

along racial lines. 177a-178a (18th ward); 232a (10th ward); Pls.' Exh. 13 at 30-33, 75-78; and Tr. 7193 (46th and 49th wards). In sum, the evidence showed that in these wards, whites have the opportunity to elect their candidates of choice and that white candidates preferred by the white community consistently defeat African-American candidates preferred by the African-American community in aldermanic and other municipal elections. Pls.' Exh. 13 at 12-16, 26-27, 75-78; Exh. 150 at 3-5; Tr. 1123, 7193.

On this record, the court of appeals held that the district court's five "multi-racial" wards must be counted as white wards, not as influence wards. 8a-9a. According to the court, these five wards are *not* wards in which the "political heft" wielded by African-Americans, "though not enough to determine [the] choice [of candidate]," is nevertheless sufficient "to exert significant influence on [that] choice." 8a. In refusing to categorize these wards as "influence wards," the court explicitly did *not* "reject the concept of an 'influence ward' " or even "suppose the concept forever inapplicable to Chicago." *Id.* Rather, "because of the rigid racial bloc voting on all sides and the district court's flawed methodology of relying on its own estimation of the responsiveness of particular incumbents to particular groups, the concept of an influence ward "is merely inapplicable *at this time on this record.*" 8a-9a (emphasis added).

Accordingly, the Seventh Circuit recognized that the map challenged in this case is one that creates 24 white-majority wards, 19 African-American-majority wards, seven Latino-majority wards, and no wards that can be characterized as "influence wards." *Id.* Because whites,

with 46% of the CVAP, have 48% of the wards, while African-Americans, with 40% of the CVAP, have only 38% of the wards, the Seventh Circuit found disproportionality. 9a, 13a. The court ruled that on the facts of this case this disparity was not trivial, 13a, since each 2% of the population accounts for a complete ward.

Turning to the issue of the availability of feasible alternatives, the court noted that the plaintiffs had submitted a map with 23 white wards and 20 African-American wards – *i.e.*, a map that reflects proportionality. 14a. The court further ruled that the maps submitted by the parties suggested that a map with 20 African-American-majority wards "would be feasible in the sense of not trampling on any values that deserve weight in redistricting." 14a. But because such a map was neither the focus of the proceedings below, nor the subject of discussion in the district court's opinion or the briefs filed by the parties on appeal, the court concluded that it "cannot determine its appropriateness." *Id.* The court therefore remanded the case for a "determination of whether the City's map violates the section 2 rights of the black plaintiffs." 15a.

REASONS FOR DENYING THE WRIT

I. *Certiorari* should not be granted because of the interlocutory posture of this case.

As this Court has observed, it "reviews judgments, not opinions." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (citations omitted). While the exercise of *certiorari* jurisdiction is, of

course, discretionary, this Court has adopted certain standards or norms governing the sound exercise of that discretion. One such principle is that the Court does not normally grant petitions for writ of *certiorari* for interlocutory review. *See Estelle v. Gamble*, 429 U.S. 97, 114-15 (1976) (Stevens, J. dissenting); *see also Texas v. Hopwood*, 518 U.S. 1033 (1996) (Ginsberg, J.).

In this case, the exercise of sound discretion should lead this Court to deny *certiorari*. What petitioners are seeking at base is a review of the Seventh Circuit's opinion, not its judgment. Nowhere is this more clear than in their expressed fear that if they prevail on remand, there will be no opportunity for them to challenge the Seventh Circuit's decision. Pet. 16. Their quarrel at this stage of the litigation must of necessity be with the court's opinion, not with its judgment, because in the current posture of this case, the Seventh Circuit has left this contest without a winner. In vacating and remanding respondents' case to the district court, the Seventh Circuit neither decided that liability had been established nor did it order any remedy. It will be the task of the district court on remand to complete the factual record and enter judgment.

There is simply no reason for this Court to rush to a review of the court of appeals' opinion before final judgment is entered. In remanding the case to the district court, the Seventh Circuit ordered that the additional proceedings be completed within 90 days. 15a. The court further indicated that any appeal from the district court's judgment would be expedited. *Id.* Thus, in all likelihood, there will be a final judgment and a complete record on which to base review in a matter of months. Under these

circumstances, there is no reason to review this case in its present interlocutory posture.

II. The Seventh Circuit's ruling that "on this record at this time" five particular Chicago aldermanic wards are not African-American influence districts creates no broad rule, produces no conflict, and will have no untoward effects on the redistricting process.

In seeking *certiorari* in the midst of this ongoing litigation, petitioners attempt to persuade the Court that the Seventh Circuit has pronounced a broad rule of general application, under which any electoral district containing less than 65% African-American population must be counted as white, even where, as a factual matter, African-Americans exercise undisputed electoral influence through their ability to form effective coalitions with whites and others. Pet. 14-15, 17. Thus, petitioners cast the first question presented as whether, in a § 2 case, a court:

> is required to give no weight to districts in which African-Americans are not sufficiently numerous to have unilateral control and thus, *although they are able to exercise considerable influence in the electoral process,* cannot be assured the power to elect an African-American candidate whenever they choose to do so.

Pet. i (emphasis added). As petitioners claim to read the opinion below, "[t]he court of appeals simply refused to accept the *concept* of African-American influence being exercised absent *unilateral* African-American control." Pet. 20 (first emphasis added).

This argument deliberately ignores the clear language of the appellate court's decision, and depends on a faulty factual premise that was explicitly rejected by the appellate court as clear error – *i.e.*, that African-Americans actually do have "considerable influence in the electoral process" in the five particular Chicago wards at issue here. Once the appellate court's opinion is correctly read, petitioners' reasons for granting *certiorari* collapse. There is no conflict with either this Court's decisions or decisions in other circuits, and there will be no dire consequences for future redistrictings.

The court of appeals could not have more clearly disavowed any intent to reject the concept of influence districts. After ruling that the district court had "clearly erred in taking these five wards out of the white column," the court took pains to remove any doubt about the scope of its ruling:

> We want to make clear, however, that in so ruling we do not reject the concept of an "influence ward" – a ward in which a minority group has enough political heft to exert significant influence on the choice of candidate though not enough to determine that choice – or suppose the concept forever inapplicable to Chicago. It is merely inapplicable *at this time on this record* . . . .

8a (emphasis added). Thus, the court explicitly did *not* reject the concept of an influence ward. All it held is that "at this time on this record" five particular Chicago aldermanic wards are *not* wards in which African-Americans, though lacking sufficient "political heft" to "determine that choice," nevertheless have "enough political heft to exert significant influence on the choice of candidate." *Id.*

Notwithstanding this clear language, petitioners insist that Judge Posner's opinion can only be read as doing exactly what he said the court was *not* doing – *i.e.*, rejecting as a general matter the concept of influence districts. Only in the last paragraph of their argument on this point do they admit the true nub of their contention – that the Seventh Circuit simply erred in ruling that these five Chicago wards are not influence districts. Pet. 22-23. In petitioners' view, their facts were so strong that the court's ruling that these five wards are not influence wards is tantamount, for all practical purposes, to a rejection of the very concept of influence wards. *Id.*

There are two problems with this argument. First, the question it presents – Did the Seventh Circuit err in ruling that Wards 10, 18, 46, 48, and 49 in the City of Chicago are not, at this time and on this record, wards in which African-Americans are able to "exert significant influence on the choice of [aldermanic] candidate?" – is not the kind of question as to which a grant of *certiorari* is appropriate. Second, the court's ruling that these five wards must be counted as effective white-majority wards was clearly correct.

In finding clear error with respect to these five wards, the appellate court rejected as flawed the trial court's reasoning. The trial court had removed these wards from the white column largely in reliance on its belief that the white aldermen in these five wards were, and indeed had to be, attentive to the interests of their minority constituents. 184a. This assessment of what the appellate court refers to as "the politics of these wards," 8a, rested on the trial court's estimation that, in each of these five wards, "it is impossible for any candidate to

succeed without managing to obtain bi-racial or multi-ethnic support." 184a. The Seventh Circuit concluded, and correctly so, that the trial court's "methodology of relying on its own estimation of the responsiveness of particular incumbents to particular groups" was "flawed." 9a. Looking instead at the electoral realities (*i.e.*, the relevant population figures and voting patterns), the Seventh Circuit reached its finding that the district court had "clearly erred in taking these five wards out of the white column." 8a.

The record on which the court ruled amply supports this conclusion. In each of these wards, whites constitute the overwhelming majority of voters on election day. *See supra*, at 8. In Ward 18, as the appellate court found:

> [B]lacks constitute only 55% of the ward's total population, which is much less than 65% [the "rule of thumb" figure for an effective black majority, 6a-7a], and the remaining population is mainly white (44 percent of the voting-age population) and in practice (that is, with due regard to registration and turnout) controls the ward.

8a.[7] In the remaining four wards, whites hold an absolute majority of the voting-age population. *See supra*, at 8, n. 6. The African-American voting-age population in these four wards is very much lower, ranging from only 11.6% in Ward 10 to a high of only 23.6% in Ward 49. Stip. Exh. 1. Petitioners have cited no case, and we know of none, in

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[7] Petitioners' attempted reliance on the city's voter registration data to show African-American influence in Ward 18 (Pet. 9) is unavailing, because the trial court gave "little credence" to this unreliable, "somewhat dubious" data. 192a.

which districts where a minority group constitutes less than 25% of the voting-age population have been treated as influence districts. To the contrary, the primary case petitioners cite as applying the concept of influence districts used a 25% voting-age population threshold to identify influence districts. *Rural West Tenn. African American Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1106-07 (W.D.Tenn.), *aff'd mem.*, 516 U.S. 801 (1995). Indeed, even petitioners' own expert did not consider these four wards to be African-American influence districts, since African-Americans comprise less than 25% of the voting-age population in each of these wards. Tr. 7726-29; Defs.' Exh. 515; Defs.' Exh. 506 at 76-77, 85, 146, 152. In the face of this concession, it is hard to see how petitioners can fault the Seventh Circuit for reaching precisely the same conclusion.

Petitioners ignore all these record facts when they argue that "it [was] only the degree of racial polarization in Chicago" that led the court to "rule[ ] out recognition of influence wards in that city." Pet. 22. The court certainly did consider the extreme degree of racial polarization that exists in Chicago aldermanic elections when it made its assessment of the political dynamic in the wards at issue. 8a-9a. And properly so, since in a jurisdiction where polarization exists, but is less rigid than in Chicago, there may be more opportunity for minorities to exercise real influence in districts where they lack an effective electoral majority. But racial polarization was not the only fact weighed by the court; it reached its "at this time on this record" conclusion that Wards 10, 18, 46, 48, and 49 are electorally-effective white wards based on a full record. *See supra* at 7-9.

In ruling that these wards function as white-controlled wards, the court also recognized the record facts that for good or for ill, both African-Americans and whites in Chicago exhibit a strong preference for aldermanic candidates of their own racial group,[8] and that African-Americans cannot win election as aldermen in the five wards, given the white percentage of the electorate in these wards and the resolute unwillingness of whites to vote for an African-American aldermanic candidate.[9] 6a, 8a. That being so, only whites – not African-Americans – have the opportunity to elect the candidates of their choice in these wards.

Petitioners excoriate the court for giving weight to this unpretty reality, insisting that *Johnson v. DeGrandy*, 512 U.S. 997 (1994) requires African-Americans (but, implicitly, not whites) to rise above racialism, quit pouting, and accept their less-than-ideal "second-choice" candidate. Pet. 10, 18, 20. It is true that *DeGrandy* says that voters – of all racial groups – can be required to "push, haul and trade" in the political process, sometimes accepting a candidate who is less than ideal to some members of a racial group. 512 U.S. at 1020. But nothing in *DeGrandy* says that § 2 is satisfied by wards where – as a function of ward demographics and political realities that include extreme racial bloc voting by white voters – African-Americans must always be the ones to accept

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[8] Contrary to petitioners' suggestion (Pet. 17, n. 8), the record fully supports this conclusion. *See supra* at 2.

[9] Petitioners' own expert conceded that African-Americans cannot win election as aldermen in these wards. Tr. 7728 (18th ward); Tr. 7847-48 (46th and 48th wards).

their second choice, while whites can always effectuate their first choice preference for electing a white alderman.

Such a holding would conflict with the plain language of the Act, which is directed at guaranteeing minority voters an opportunity to elect candidates of their choice that is fully "equal" to the opportunity enjoyed by whites. Contrary to petitioners' insistence (Pet. 20), nothing in the case law says that African-Americans' § 2 right to an equal opportunity to elect their candidates of choice is in any way diminished when their candidates of choice are African-American. Indeed, the courts have consistently reaffirmed the opposite: that the promise of § 2 is unmet when African-Americans can elect their candidates of choice only when those candidates are white. *Sanchez v. Colorado*, 97 F.3d 1303, 1321 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 1820 (1997); *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1015 (2d Cir. 1995); *Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995); *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D.Ark.) (three-judge court), *aff'd*, 488 U.S. 988 (1988). These cases defeat petitioners' assertion that, by recognizing that African-Americans have the right to an equal opportunity to elect their candidates of choice even when those candidates are themselves African-Americans, the Seventh Circuit has either assumed or created a right on the part of African-Americans to strict proportional representation. *See* Pet. 13, 20.

Ignoring these holdings, petitioners claim to find conflict between the Seventh Circuit's opinion and three opinions which conclude that a white candidate can be the true candidate of choice of African-American voters. Pet. 14, 20-21. But there is no inconsistency whatsoever

between acknowledging the possibility that a white could be the African-American candidate of choice, and holding – as did the Seventh Circuit – that where this is not so, equality of electoral opportunity is lacking when only whites, but not African-Americans, can elect a preferred candidate who is of their own race.

Indeed, one of the cases petitioners cite, *Niagara Falls, supra*, makes this unmistakably clear. At the same time it declined to "preclud[e] the possibility that a white candidate can be the actual and legitimate choice of minority voters," 65 F.3d at 1016, the Second Circuit recognized that "[o]ften the representatives of choice of a protected class will be members of that class," *id.*, at 1015.[10] "And," the Second Circuit continued, "the Act seeks to ensure that members of a class have the right to an equal opportunity to obtain representation by members of their class."

Thus, *DeGrandy*'s exhortation to push, haul, and trade finds expression in those communities, which happily do exist, where minorities "hav[e] no need to be a majority within a single district in order to elect candidates of their choice." *DeGrandy*, 512 U.S. at 1020. But what the Seventh Circuit found is that Chicago is not, on this record, one of these communities. It is instead one of another kind of community that was also recognized in *DeGrandy*: communities where "society's racial and ethnic

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[10] In support of this statement, the court cited the same *Gingles* plurality opinion of Justice Brennan on which petitioners rely, in which Justice Brennan recognizes that "it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites." *Id.*, at 1015, quoting *Gingles*, 478 U.S. at 68 (plurality opinion of Brennan, J.).

cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity." *Id.*

In sum, on a full record and correct reasoning, the Seventh Circuit ruled that Wards 10, 18, 46, 48, and 49 in the City of Chicago are effective white-majority wards, not African-American influence wards. It did not reject the concept of influence wards, either explicitly or implicitly. Nothing in the court's opinion belies its explicit disclaimer that its rejection of the *applicability* of the influence district concept should not be mistakenly read as a rejection of the concept itself.

Once the Seventh Circuit's ruling is correctly read, petitioners' claims of conflict melt away. Petitioners assert a "stark" conflict with *DeGrandy*, arguing that "*DeGrandy* expressly recognized that minority voters can exercise political power and elect candidates of their choice even though they are not a majority in a given district." Pet. 13, 17-18. But what *DeGrandy* actually said is that minority voters can do so in some communities – not, unfortunately, everywhere. 512 U.S. at 1020. All that the Seventh Circuit has held in this case is that, on this record and at this time, Chicago is one of the jurisdictions where enduring racial cleavages deny African-Americans any significant electoral opportunity outside of African-American majority districts.[11] This is no conflict with *DeGrandy*.

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[11] Indeed, it is because there continue to exist communities where racial cleavages necessitate majority-minority districts that this Court continues to recognize "all the virtues of majority-minority districts as remedial devices" in voting rights litigation. *DeGrandy*, 512 U.S. at 1020.

The Seventh Circuit's ruling is likewise not in conflict with the circuit and district court opinions cited by petitioners as in conflict on this point. *See* Pet. 19-20. All that the First Circuit said in *Uno v. City of Holyoke*, 72 F.3d 973 (1st Cir. 1995), was that on remand the district court should consider *whether* a district with a 28% Hispanic voting-age population[12] should be treated as an influence district – *i.e.*, a district in which members of a minority group "are sufficiently numerous to have a significant impact at the ballot box most of the time," *id.*, at 991 – based on an "evaluation of the degree of influence exercisable by the minority, consistent with the political realities, past and present." *Id.* There is no inconsistency between this remand and the Seventh Circuit's ruling that at this time on this record the influence district concept is inapplicable to Chicago aldermanic wards.

Nor is there a conflict with the district court opinion in *McWherter, supra*. In that case, the court held, based on evidence regarding the realities of Tennessee politics, that electoral districts with at least a 25% African-American voting-age population had sufficient influence to be deemed influence districts. 877 F. Supp. at 1106-07. The *McWherter* court did not state that the political realities in other jurisdictions should be disregarded in determining

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[12] Only one of the five wards as to which petitioners decry the court's refusal to find influence district status has an African-American voting-age population as high as the 28% that the First Circuit found sufficient to warrant further scrutiny. The African-American voting-age population in the other four wards ranges from a low of 11.6% to a high of only 23.6%. Stip. Exh. 1. It is not clear that the First Circuit would even contemplate influence district status for wards with such low African-American populations.

whether wards in those jurisdictions function as influence districts; had it done so, it would have been in clear conflict with this Court's admonition that "whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.' " *DeGrandy*, 512 U.S. at 1018, *quoting White v. Regester*, 412 U.S. 755, 766 (1973). Thus, *McWherter* cannot reasonably be read in a way that conflicts with the Seventh Circuit's ruling in this case.

Finally, a correct reading of the Seventh Circuit's opinion refutes petitioners' claim that the decision will force the hand of future redistricters and lead to an across-the-board avoidance of districts in which various racial groups can truly share influence. The clear language of this decision abjures any condemnation of the drawing of influence districts in those communities where political realities permit a meaningful sharing of influence. The simple mandate of this case is that in those communities where enduring "racial cleavages" continue to "necessitate majority-minority districts to ensure equal political and electoral opportunity," *DeGrandy*, 512 U.S. at 1020, a false finding of proportionality cannot be achieved by mischaracterizing as "multi-racial" wards in which whites, through a combination of ward demographics and political realities that include extreme racial polarization, in fact can exercise unilateral political control.

In sum, this is not a case where the Seventh Circuit "refused to accept the concept" of influence wards; it is a case where the petitioners refuse to accept the Seventh Circuit's ruling that on the record in this case Wards 10, 18, 46, 48, and 49 are effective white wards. The decision

of the Seventh Circuit creates no conflicts and produces no untoward consequences. *Certiorari* should be denied.

III. The Seventh Circuit's treatment of disproportionality is consistent with the case law and will have no untoward effects on the redistricting process.

Certiorari should also be denied as to the second question petitioners claim is presented by this case. Petitioners argue that, even accepting the appellate court's view that there are 24 white wards and only 19 African-American wards, the district court's finding of rough proportionality stands. Pet. 24. The premise of this argument is petitioners' belief that, in a city where whites are 46% of the relevant population and African-Americans are 40%, a map that gives whites 48% of the wards (24 of 50) and African-Americans 38% (19 of 50) provides "rough proportionality" as that term is used in *DeGrandy*. Petitioners castigate the appellate court for remanding this case for further consideration "based solely on a 2 percent deviation from perfect proportionality." *Id.*

Petitioners' argument is multiply flawed, and in any event provides no reason for granting *certiorari*, particularly in view of the interlocutory posture of this case. At the outset, the court of appeals did not remand solely on the basis of the deviation from proportionality; it remanded this case because "the reasoning by which the district judge approved the City's map, which created only 19 black-majority wards, was deeply flawed." 14a. On the record before the court, *see supra*, at 2-10, this conclusion was more than amply justified.

But even had the appellate court remanded solely due to the district court's erroneous finding of proportionality, there would be no error and certainly no cause for granting *certiorari*. Evidence of disproportionality is always relevant, *DeGrandy*, 512 U.S. at 1025 (O'Connor, J., concurring), but here, the district court having erroneously found proportionality, obviously did not give weight to the evidence of *dis*proportionality. Indeed, we do not read petitioners to be quarreling with the proposition that a remand can be appropriate where a trial court erroneously finds rough or substantial proportionality. Rather, they quarrel with the appellate court because, they claim, the court left intact the finding of *rough* proportionality, but nevertheless remanded because of lack of *perfect* proportionality. Pet. 24. According to petitioners, this "cannot be squared with *DeGrandy*." Pet. 14, 23.

This argument misstates the appellate court decision. Nowhere in that opinion did the court affirm the lower court's finding of "rough" proportionality. To the contrary, it specifically ruled that the map's "deviations" from proportionality – both upward for whites and downward for African-Americans – are "not trivial." 13a. And that ruling in no way conflicts with *DeGrandy*. In *DeGrandy*, this Court found rough proportionality where Hispanics constituted an effective majority in the number of house and senate districts that most closely approximated the exact percentages of Hispanic population in the relevant geographic areas. 512 U.S. at 1014, 1023. It is true that, by one measure of the relevant geographic area, the percentage of Hispanic-majority house districts, 45% (9 of 20 districts), was two percentage points lower than

the Hispanic percentage of the voting-age population, 47%. *Id.*, at 1014. But had there been one additional Hispanic house district, the percentage of Hispanic-majority house districts would have risen to 50% (10 of 20 districts). Thus, in *DeGrandy*, the creation of an additional Hispanic-majority district would have caused an *over*-proportionality of three percentage points – a deviation from exact proportionality greater than the existing two percentage point *under*proportionality.[13] It was under these circumstances that this Court found rough proportionality. Nothing in *DeGrandy* suggests that rough proportionality obtains when the functional significance of deviations of two percentage points is that whites have one full ward more than proportionality and African-Americans have one full ward less.

Petitioners urge a grant of *certiorari* because, they insist, the appellate court's approach "makes no sense." Pet. 23. But what would be truly nonsensical is the approach petitioners advocate, under which the distinction between "rough proportionality" and disproportionality is determined without regard to the functional significance of the deviation from exact proportionality – *i.e.*, without regard to whether the creation of an additional minority ward, or the subtraction of a white one,

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[13] The same is true with respect to the senate districts examined in *DeGrandy*. The percentage of Hispanic-majority senate districts, 42.9% (three of seven districts), was 1.9 percentage points lower than the Hispanic percentage of the voting-age population, 44.8%. 512 U.S. at 1023. But the creation of an additional Hispanic senate district would have produced a much larger upward deviation from proportionality, by giving Hispanics 57.1% (four of seven) of the districts.

would bring the percentages closer in line with exact proportionality. If a two percentage point deviation is not enough, how about a deviation of five percentage points? If not five, how about ten? Divorced from a consideration of the functional impact, there is simply no principled way to decide what is *de minimis*. And, we note, an absolute numerical rule could cut against redistricters, as well as § 2 plaintiffs. Suppose that a ten-percentage-point deviation is accepted as being outside the range of rough proportionality. In a jurisdiction where African-Americans are 35% of the population, and hold majorities in one of four districts (25%), there would be a ten-percentage-point deviation. Yet the creation of one more African-American district would bring that group's percentage of districts up to 50% – a greater deviation *over* proportionality than the initial ten-percentage-point deviation below proportionality. In such a situation – as in the current case – a focus on only the absolute size of the deviation, without regard to its functional significance, would lead to a nonsensical result.

In seeking *certiorari*, petitioners do not assert that the Seventh Circuit's treatment of disproportionality conflicts with the decisions of other courts. Nor could they; it is their own interpretation that would conflict. Thus, in *Stabler v. County of Thurston*, 129 F.3d 1015 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1796 (1998), the Eighth Circuit, citing *DeGrandy*, upheld a finding of disproportionality where the creation of a third majority-minority district "results in less disparity than the current plan and more closely approximates rough, or substantial, proportionality." *Id.*, at 1022. And in *McWherter, supra*, the three-judge district court ruled that substantial proportionality

exists when a plan "create[s] the maximum number of majority-minority districts possible without exceeding proportionality." 877 F. Supp. at 1107, n. 12.

Finally, petitioners argue that, by predicating remand on a 2% deviation from proportionality, the Seventh Circuit's approach unduly intrudes on the discretion that states and localities should have to "balance competing interests" in the redistricting process. Pet. at 23-24. Setting aside the fact that the remand was *not* based solely on the deviation from proportionality, *see supra* at 23, petitioners' argument lacks merit. In rejecting a "safe harbor" rule, this Court has already held that even in the face of undisputed proportionality, redistricting plans are not immune from federal court review under § 2. *DeGrandy*, 512 U.S. at 1017-21. If it is not unduly intrusive for courts to review fully proportional plans under § 2, it is hard to see how it could be unduly intrusive for courts to review plans that deviate from proportionality by numerically modest but, as here, functionally-significant amounts.

Moreover, the Seventh Circuit's decision in no way compromises the ability of a jurisdiction to balance competing redistricting interests, so long as those interests are legitimate ones. The court "emphasized" that "proportionality is not the only consideration in determining a violation of section 2," 15a, and held that

> [d]eviations from proportionality, especially small ones, can be justified by reference to other factors, such as the compactness of districts and the desirability of preserving continuity and recognizing topographical, cultural, and economic

> factors that may make one ward mapping preserve communities of political interest better than another.

14a. The court's ruling thus fully preserves the ability of jurisdictions engaged in future redistrictings to give effect to "values that deserve weight in redistricting." *Id.*

In sum, despite the provocative charges leveled against the Seventh Circuit's decision, the remand in this case was fully appropriate. Judgment was vacated and the case was remanded based on an extensive record of vote dilution and on the appellate court's correct conclusion that "the reasoning by which the district court approved the City's map . . . was deeply flawed." The court's treatment of proportionality is fully consistent with this Court's decision in *DeGrandy* and with the decisions of the Eighth Circuit in *Stabler* and the three-judge district court in *McWherter*. Finally, the appellate court's decision will have no untoward effects on future redistrictings; it is neither unduly intrusive nor threatening to the ability of jurisdictions to effectuate their legitimate redistricting criteria. For all of these reasons, this is not a case where this Court should take the unusual step of accepting for review a case that remains in an interlocutory posture. *Certiorari* should be denied.

IV. CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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